84-114

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KENNETH R. AMIDON, DONALD H. LAJOIE
and JAMES M. ELWOOD,

Petitioners

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE,
JOHN F. LEHMAN, JR., SECRETARY OF THE
NAVY, and ADMIRAL THOMAS M. HAYWARD,
CHIEF OF NAVAL OPERATIONS,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Petitioners, Kenneth R. Amidon, Donald H. Lajoie and James M. Elwood, respectfully pray that a Writ of Certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Fourth Circuit entered in these proceedings on January 13, 1984.

QUESTIONS PRESENTED FOR REVIEW

1. In the context of the section of the Equal Access to Justice Act permitting the Government, when it loses a case, to avoid liability for attorneys' fees if it can demonstrate that the position of the United States was substantially justified, must not the Government demonstrate that its underlying action which necessitated the litigation against it was substantially justified?

2. Where Petitioners were prevailing parties on the merits in both the District and Circuit Courts based on facts undetermined but viewed in the light most favorable to the Government, and the District Court in awarding fees under the Equal Access to Justice Act held that the Government was estopped from arguing that its position was substantially justified because its unreasonable action necessitated the litigation, did the Fourth Circuit exceed the proper bounds of appellate review by finding facts in the first instance without plenary hearing and in favor of the party with the burden of proof, thus abridging petitioners' rights under the Equal Access to Justice Act and under the due process clause of the Fifth Amendment?

3. Where the Government's position in involuntarily extending the enlistments of three Navy enlisted men was challenged on independent administrative, statutory and constitutional grounds, to avoid liability for attorneys' fees under the Equal Access to Justice Act, must not the Government demonstrate, at a minimum, that its position with respect to each of those challenges had a reasonable basis in fact and law?

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CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, is reported at 730 F.2d 949 (4th Cir. 1984) and included in the Appendix hereto commencing at page 1a. No opinion was rendered by the United States District Court for the Eastern District of Virginia, but the unreported orders and the oral explication of the Court's ruling are included in the Appendix hereto at pages 18a-26a. The United States District Court for the Eastern District of Virginia rendered an unpublished opinion on the underlying habeas corpus proceeding involving Petitioner Amidon and that opinion is included in the Appendix hereto commencing at page 27a. The Court of Appeals issued an opinion in the consolidated appeals in the habeas corpus proceedings involving

Petitioners Amidon and Lajoie which is reported at 677 F.2d 17 (4th Cir. 1982) and is included in the Appendix hereto commencing at page 46a.

JURISDICTION

The judgments of the Court of Appeals for the Fourth Circuit in the consolidated appeals were entered on January 13, 1984. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 2, 1984. This Petition for a Writ of Certiorari was filed within 90 days of the date of entry of the Order denying the Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property without due process of law; . . . .

Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A):

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT OF THE CASE

The questions presented in this Petition involve awards of fees and expenses under the Equal Access to Justice

Act, 28 U.S.C. § 2412(d) ("EAJA"), entered in favor of Petitioners by the United States District Court for the Eastern District of Virginia and reversed by the United States Court of Appeals for the Fourth Circuit. The underlying litigations from which these EAJA awards arose were (1) a habeas corpus proceeding initiated by Kenneth Amidon on April 23, 1981, seeking discharge from the Navy by reason of the expiration of his enlistment; (2) a habeas corpus proceeding initiated by Donald Lajoie on April 20, 1981, whose enlistment expired on August 18, 1981, and (3) a habeas corpus proceeding initiated by James Elwood on February 4, 1982, seeking discharge from the Navy by reason of the expiration of his enlistment on February 3, 1982. Federal jurisdiction in each case was

conferred by 28 U.S.C. § 2241. In each case the Navy argued that the Navy was obliged and empowered to involuntarily extend the enlistments by reason of custodial obligations under an Executive Agreement implementing a Treaty with Spain. Although the facts and legal issues involved in the underlying actions are not necessary for consideration of the questions here presented, they put the issues in context. Accordingly, portions of the Memorandum in the Elwood case are included in the Appendix hereto commencing at page 58a.

The first case decided by the District Court was the Amidon case. Although substantial issues of material fact were raised by the petition and answer, no plenary hearing was ever held, the District Court determining by Order

dated June 22, 1981 that Amidon was entitled to the requested relief "having viewed the facts of record most favorably to Respondents." See Appendix at pages 44a-45a.

On August 27, 1981, following the expiration of Lajoie's enlistment, and resolving, for purposes of disposition of Lajoie's Motion for Summary Judgment, disputed facts in a light most favorable to the Navy and without plenary hearing, the District Court ordered Lajoie's release on the authority of its decision in the Amidon case.

The Elwood case here relevant was commenced on February 4, 1982, the day after his enlistment expired. On April 28, 1982, the Fourth Circuit held in the Amidon/Lajoie appeal, that the Navy's legal argument was without basis.

Thereafter, the Navy persisted in pressing that same legal argument before the District Court in the Elwood case, necessitating continuing litigation through judgment, the filing of an appeal to the Fourth Circuit (ultimately dismissed) and discharge which did not occur until after these fee applications were argued in the District Court.

At the hearing on the fee applications, no evidence was presented by the Navy, and the District Court never analysed the question of whether the position of the United States was substantially justified, adopting a rule that a litigant's position can never be substantially justified where the reason for the litigation flows from some prior negligent handling of a case. Appendix at page 24a. The Fourth Circuit rejected

this rule as a matter of law. However, rather than vacating the Orders of the District Court and remanding the cases for substantial justification analysis, the Court addressed this question in the first instance without benefit of the District Court's analysis and without findings of fact ever having been made, either in the underlying habeas proceedings or in connection with the fee applications. Without evidence, without hearing and without any notice to petitioners of its intention to do so, and although the burden of proof was on the Government, the Fourth Circuit found that the position of the United States was substantially justified in fact and law. Moreover, in making that determination the Fourth Circuit did not address any of the facts unique to the Elwood case, and did not

address any of the legal challenges to the involuntary enlistment extensions other than the issue which had been resolved against the Navy in the Amidon/Lajoie appeal. The Fourth Circuit flatly reversed the fee awards of the District Court and assessed costs against Amidon, Lajoie and Elwood. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied as was a Request for Reconsideration of Taxation of Costs.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's Decision That "Position Of The United States" In The Context Of The Equal Access To Justice Act Is Limited To The Government's Litigation Position Is In Direct Conflict With Decisions Of The Courts Of Appeals For The Third And Ninth Circuits

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides for an award of fees and expenses to the prevailing party except when, inter alia, "the court finds that the position of the United States was substantially justified . . . ." 28 U.S.C. § 2412(d)(1)(A). In the cases now before this Court, the Fourth Circuit held that in reviewing the Government's claim of substantial justification the Court's inquiry "is restricted to a consideration of the Government's position with respect to the litigation once it has ensued." Amidon v. Lehman, 730 F.2d 949, 952 (4th Cir. 1984). This interpretation, previously enunciated by the Fourth Circuit in Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982), has come to be known as the "litigation position" theory, and has been adopted, in

addition to the Fourth Circuit, by the Federal Circuit; See Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387, 1390-91 (Fed. Cir. 1982); Kay Mfg. Co. v. United States, 699 F.2d 1376, 1379 (Fed. Cir. 1983); Gava v. United States, 699 F.2d 1367, 1370 (Fed. Cir. 1983); but see Bailey v. United States, 721 F.2d 357, 360 (Fed. Cir. 1983); the D.C. Circuit: See Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983) cert. denied 104 S.Ct. 1908 (1984); Del Mfg. Co. v. United States, 723 F.2d 980, 988 (D.C. Cir. 1983); and the Tenth Circuit: See United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984).

The countervailing interpretation of the term "position of the United States" in the context of EAJA will not relieve the Government from liability for

attorneys' fees unless both the governmental action that precipitated the lawsuit and the position assumed by the government in litigation are substantially justified. This interpretation, often referred to as the "underlying position" theory, has been expressly adopted by the Third Circuit: Natural Resources Defense Council v. EPA, 703 F.2d 700, 707 (3d Cir. 1983); and the Ninth Circuit: Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984); Wolverton v. Heckler, 726 F.2d 580, 583 (9th Cir. 1984).

The Second Circuit has recognized that "[t]he proper interpretation of the word 'position' in the EAJA is, indeed, an unsettled question. The circuits are split on the point . . . ." Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081, 1084 (2d Cir. 1983). Although the Second

Circuit stated that it was refraining from deciding the issue, it effectively applied the "underlying action" theory, by finding that the Government's position lacked substantial justification on either theory and by implicitly approving the District Court's application of the "underlying action" theory. 722 F.2d at 1086. The Eight Circuit has taken a similar stance. In Cornella v. Schweiker, 728 F.2d 978, 982 (8th Cir. 1984), the Court noted that the "legislative history of the EAJA is inconclusive on which position is to be examined . . . We have reviewed the opinions on the subject and find that there are persuasive arguments supporting both the 'underlying action' and the 'litigation position' theories." The Court examined both positions as had the District Court. In a like vein in

Premachandra v. Mitts, 727 F.2d 717, 730 n. 17 (8th Cir. 1984), the Court recognized that:

> Circuit Courts squarely addressing the nettlesome issue of whether Congress intended for the government's "position to include the underlying agency action have read the same legislative history and come to different results....This split reveals the extreme closeness of this issue.

The Court declined to decide the issue, however, because the District Court had failed to make any findings as to the reasonableness of the Government's prelitigation or litigation positions.

The Fifth Circuit also without deciding the issue has noted that:

> Neither the Act nor the legislative history provides a conclusive answer as to whether the "position" for which substantial justification must be shown is the United States'

> litigation position or the United States' posture in its pre-trial action."

Knights of the K.K.K. v. East Baton Rouge, 679 F.2d 64, 68 (5th Cir. 1982). Subsequent District Court decisions in the Fifth Circuit, however, have applied the "underlying position" theory. E.g., Ashburn v. United States, 577 F.Supp. 59, 64 (N.D. Ala. 1983).

These conflicts and uncertainty justify the grant of certiorari to review the judgments below and resolve the frequently recurring issue.

2. The Proper Construction Of The "Substantial Justification" Standard Of The Equal Access To Justice Act Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court

By passage of the Equal Access to Justice Act, 28 U.S.C. § 2412, effective

October 1, 1981, Congress intended to remove an obstacle to contesting unreasonable governmental action through litigation. The House Report accompanying the Act finds that certain parties may be deterred from challenging governmental conduct because of the expense involved in vindicating their rights. See H. R. Rep. No. 1418, 96th Cong., 2d Sess. 5, 9 reprinted in 1980 U.S. Code Cong. & Ad. News 4948, 4988. Accordingly, the Act provides for an award of attorneys' fees and expenses to parties prevailing against the Government.

The interpretation of "substantial justification" adopted by the Courts of Appeals for the District of Columbia, Federal, Fourth and Tenth Circuits emasculates the Act and totally frustrates Congressional intent. EAJA was enacted to

redress Congress' recognition that "the ability of most citizens to contest any unreasonable exercise of authority has decreased" 1980 U.S. Code Cong. & Ad. News at 4988. Clearly, the "substantial justification" exception to a fee award was intended to relate to the "exercise of authority" which necessitated the litigation. The "litigation position" theory permits the Government to "remain intransigent throughout the administrative process and hope that the individual is unwilling to undertake the expense of challenging its action in court" where "if the government loses its gamble and finds itself in court, nevertheless, it can then simply give up at no cost whatsoever. [T]his is precisely the kind of bullying the Congress hoped to deter by permitting the award of attorneys' fees for

successful challenges to government action." Del Mfg Co. v. United States, 723 F.2d 980, 988 (D.C. Cir. 1983) (Wald, J. dissenting). Unless this Court addresses this important question of federal law, the beneficiaries of EAJA will be bereft of Congress' remedial grant. The interpretation adopted below and embraced in three other circuits:

> ". . . means that no matter how outrageously improper the agency action has been, and no matter how intransigently a wrong position has been maintained prior to the litigation, and no matter how often the same agency repeats the offending conduct, the statute has no application, so long as employees of the Justice Department act reasonably when they appear before the court."

Natural Resources Defense Council v. EPA, 703 F.2d 700, 706-707 (3d Cir. 1983).

The magnitude of the impact of the courts' restrictive interpretation of EAJA and the consequent frustration of Congressional intent is graphically demonstrated by a comparison of Congressional cost estimates of EAJA and the actual experience. The Congressional Budget Office estimated that in fiscal years 1982, 1983 and 1984, the costs of award payments would be $92 million, $109 million and $129 million, respectively. 1980 U.S. Code, Cong. & Ad. News at 5000. In fact, during fiscal year 1982, federal courts granted 12 petitions awarding a total of $703,916. Report By The Director of the Administrative Office of the United States Court on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980, July 1, 1982 through June 30, 1983, dated September 23,

1983 ["the 1983 Report"]. During fiscal year 1983, federal courts awarded a total of $1,717,094, but as noted in the 1983 Report, this figure is not the amount received by successful petitioners because the United States has appealed most of the awards. 1983 Report at page 3.

The application of the "litigation position" theory has significantly limited the efficacy and impact of the salutory Congressional action in enacting EAJA. This important question of federal law should be settled by this Court, and justifies review of these cases where fee awards had been made by the District Court.

3. The Fourth Circuit's Resolution Of Factual Issues In The First Instance Conflicts With Applicable Decisions Of This Court Regarding The Proper Role Of Appellate Courts

The District Court did not address the issue of whether the position of the United States was substantially justified, by application of an estoppel theory prohibiting the government from arguing that its litigation position was substantially justified where its earlier negligent handling of the case necessitated the litigation.

Having rejected the estoppel theory, however, the appropriate relief to the Government should have been for the Fourth Circuit to remand the cases to the District Court to entertain the Government's claim that its position was substantially justified and to make appropriate findings of fact and conclusions of law.[1/] The Fourth Circuit,

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1/ The fee awards could have been affirmed viewing the facts most (continued)

however, addressed this question in the first instance, finding that there was a reasonable basis in fact and law for the Government's position. Such action conflicts with clear precedent as to the proper respective roles of the federal appellate and trial courts. As this Court admonished in Zenith Corp. v. Hazeltine, 395 U.S. 100, 123 (1969), "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Where the District Court has not found the necessary facts with sufficient detail and exactness to permit intelligent appellate review, the Court of Appeals is compelled "to remand the cause for detailed findings of fact and conclusions of law by the trial court."

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favorably to appellants, but they cannot properly be reversed on such a construction of the facts.

EEOC v. United Virginia Bank/Seaboard National, 555 F.2d 403, 406 (4th Cir. 1977).

There were material facts in dispute in these cases. The factual record was never developed, however, nor were the hearings mandated by 28 U.S.C. § 2243 held, the District Court having granted summary judgments in favor of Amidon, Lajoie and Elwood viewing the facts in the light most favorable to the Navy. In considering a governmental defense of substantial justification in which the Government has the burden of proof, the facts must be found and clearly may not be viewed in the light most favorable to the Navy, particularly where there has been no plenary hearing. See, e.g., Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

The proper place to establish facts essential to an issue presented on appeal is in the District Court and if a party has not been afforded such an opportunity, the remedy is remand. Sims v. Smyth, 282 F.2d 814 (4th Cir. 1960). The question of whether counsel's actions in litigation are reasonable is a question of fact to be decided by the trial court whose findings shall govern unless they are clearly erroneous. United States v. Cockrell, 720 F.2d 1423, 1426 (5th Cir. 1983).

Appellate review of EAJA awards is not to determine de novo the prevailing parties' entitlement to attorneys' fees. Spencer v. NLRB, 712 F.2d 539, 561 (D.C. Cir. 1983) cert. denied 104 S.Ct. 1908 (1984). In these cases there was dispute not only as to the governing legal principles, but also competing

characterizations of the underlying facts. The latter issues involve the same "weighing of evidence entailed by ordinary findings of fact--and at which trial judges are especially experienced and skilled." 712 F.2d at 564.

Where, in an application for fees under EAJA, the District Court has "made no findings on whether the government was substantially justified," the matter should be remanded as "[t]hese are questions to be answered by the district court in the first instance." Goldhaber v. Foley, 698 F.2d 193, 198 (3d Cir. 1983). Where there is a lack of a factual basis to evaluate a lower court's ruling on an EAJA application, the appropriate appellate response is to remand. See Bailey v. United States, 721 F.2d 357 (Fed. Cir. 1983).

In deciding disputed factual issues in the first instance, the Fourth Circuit "appears to have misapprehended or grossly misapplied" the proper standard of appellate review, a circumstance under which this Court should intervene. Mobil Oil Corp. v. FPC, 417 U.S. 283, 310 (1974); Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951). Were this the only issue presented for review, disposition of this Petition by a summary disposition on the merits pursuant to Rule 23.1 would appear appropriate.

4. The Fourth Circuit's Limitation Of Substantial Justification Analysis To Only One Legal Challenge To The Enlistment Extensions Conflicts With The Decisions Of All other Circuits Addressing The Issue

In these cases, Petitioners challenged the propriety of their

continued detention in the Navy not only as factually unsupported but as contrary to law on multiple independently dispositive bases. Although it would have been necessary for the Navy to have prevailed on every legal challenge to sustain its position that it was authorized to involuntarily extend Amidon, Lajoie and Elwood, it prevailed on none of those theories. Before the Navy can ever satisfy its burden that its position was substantially justified, it must show that it was substantially justified as to each of those issues. Goldhaber v. Foley, 698 F.2d 193, 197 (3d Cir. 1983); See also, Southern Oregon Citizens v. Clark, 720 F.2d 1475 (9th Cir. 1983). As noted by Circuit Judge Baldwin in Gava v. United States, 699 F.2d 1367, 1375, (Fed. Cir. 1983) (dissenting opinion):

> The government was obliged to evaluate each ground for challenging the propriety of Gava's dismissal. Absent a reasonable basis for defending on any determinative issue in the case, the government's position cannot be deemed "substantially justified" under the Act.

See also Cinciarelli v. Reagan, 729 F.2d 801, 807 (D.C. Cir. 1984).

The Fourth Circuit's reversal of fee awards by addressing only one legal challenge conflicts with the clear precedent of every other Circuit Court addressing the issue, and this conflict warrants review of these cases on this issue.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Dated: May 31, 1984

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Amidon, et. al.	:	
	:	
Appellees	:	Nos. 82-2028
	:	82-2029
v.	:	82-2030
	:	
Lehman, et. al.	:	
	:	
Appellants	:	

WINTER, Chief Judge:

Three Navy servicemen (Amidon, Lajoie and Elwood) were ultimately granted writs of habeas corpus after the Navy unilaterally extended their enlistments. We had occasion to affirm the grants as to Amidon and Lajoie. See Amidon v. Lehman, 677 F.2d 17 (4 Cir. 1982). Thereafter, the district court granted the petitions of all three for fee awards under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. The Secretary appeals,

contending that the awards are improper under EAJA because two of the applications were not timely filed, and because the Government's position in all three cases was substantially justified. We hold that the Government's position in each case was substantially justified. We therefore reverse without reaching the question of timeliness.

I.

The underlying facts of this case are set forth in Amidon v. Lehman, supra. Succinctly stated, Amidon, Lajoie and Elwood were implicated in the March, 1980, murder of a Navy serviceman in Spain. Under "The Agreement in Implementation of the Treaty of Friendship and Cooperation between Spain and the United States of America" (the Agreement),

the United States had primary jurisdiction over the suspects. Recognizing this, the Spanish courts surrendered custody of the men to the United States after conducting an initial inquiry. Because it failed to comply with statutory speedy trial requirements, however, the Navy was unable to court-martial the men. Instead, it unilaterally extended their active duty periods, relying on Article XVIII, ¶3 of the Agreement, which provides:

> The custody of a member of the United States Personnel in Spain, who is legally subject to detention by the military authorities of the United States and over whom Spanish jurisdiction is to be exercised, shall be the responsibility of the United States military authorities, at their request, until the conclusion of all judicial proceedings, at which time the member will be delivered to Spanish authorities at their request for execution of the sentence . . . .

When the Navy extended the suspects' service commitments, it was unclear whether Spanish authorities could recover jurisdiction under the Agreement and whether they would prosecute if they could.

In April, 1981, the three suspects filed petitions for writs of habeas corpus in the Eastern District of Virginia. The district court rejected that of Elwood, but granted those of Amidon and Lajoie. The decision in Elwood's case, affirmed by us on appeal, was that the Navy properly continued Elwood on active duty because his voluntary enlistment had neither expired nor been canceled. See Elwood v. Lehman, 673 F.2d 1309 (4 Cir. 1982). The district court's decision in the Amidon and Lajoie cases turned on construction of the language "over whom Spanish

jurisdiction is to be exercised." The district court held that the Agreement did not authorize the men's detention because the exercise of Spanish jurisdiction was at best a possibility, not a certainty. Accordingly, it issued the writs.

On appeal, we affirmed, albeit for different reasons. We held that the Agreement authorizes detention of American personnel for Spanish authorities only when two conditions are met - when the armed service in question has independent authority to detain the service member and when "a determination [is] made that Spanish jurisdiction is to be exercised." Amidon v. Lehman, 677 F.2d, at 19. We did not explore the parameters of the second condition, for we held that the Navy had no independent basis for detaining Amidon and Lajoie. Id. at 20.

This holding was based on a determination that the Bureau of Naval Personnel Manual (BUPERSMAN) article that purported to authorize these involuntary extensions was itself invalid. Id. Under 32 C.F.R. § 700.1201, any BUPERSMAN article that amends a Navy regulation is void; this article, we concluded, "amended" 32 C.F.R. § 730.4(e) by increasing the bases for extending enlistments.

After our decision in Amidon, the Secretary petitioned for rehearing, asking for an opportunity to contest our construction of the Agreement and the provision of the Code of Federal Regulations under which we invalidated the BUPERSMAN article at issue. We, however, denied the petition.

While the appeals concerning Amidon and Lajoie were pending, Elwood's

voluntary enlistment period expired, and the Navy unilaterally extended his tour of active duty. He again sought habeas relief, which the district court eventually granted. When he applied for the writ, we had not yet decided Amidon. The Navy, relying on the district court decision in Amidon, took the position that it could detain Elwood because Spain had by then decided to prosecute. When our decision in Amidon was filed, the position of the Spanish authorities became irrelevant; the district court, accordingly, granted Elwood's petition.

After hearing argument on the three petitions for attorneys fees under EAJA, the district court delivered an oral opinion granting the petitions. It ruled that the Navy had been negligent in its prior handling of the case by requesting

Spain to surrender jurisdiction to the United States and then failing to comply with United States law requiring a speedy trial. In its view, one who had negligently brought about the litigation for which fees were sought could not be "substantially justified" in its position in that litigation. Accordingly, the district court awarded fees against the Secretary.

II.

Our decision in this case is controlled by the "substantially justified" test contained in § 2412(d)(1)(A) of EAJA.[1/] In Tyler

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1/ The full text of that section is:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees (continued)

Business Services, Inc. v. NLRB, 695 F.2d 73 (4 Cir. 1982), we considered two aspects of § 2412(d)(1)(A) which are relevant in this case. First, with respect to the "substantially justified" test, we quoted from the legislative history of EAJA:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis in both law and fact, no award will be made.

> and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980) reprinted in 1980 U.S. Code Cong. & Ad. News 4953, 4993). Id. at 75. We also commented on the meaning of the phrase "position of the United States", and held that it meant "the government's position as a party in prosecuting or defending the litigation at whatever level is under review for the awarding of attorney's fees." Id. at 75 (footnote omitted). Thus we held that, to escape liability under EAJA, the Government must show, not that its underlying action was substantially justified, but that its position as a party in prosecuting or defending the action was.

We agree with the Government that, in the instant cases, the district court improperly looked to prelitigation events in evaluating the Government's

position. Specifically, it concluded "they [the Government] can't say that we were substantially justified where their own negligent handling of the case was the reason for the litigation." We think, however, that whether the Government found itself in court in part because of its "negligent handling of the case" is simply beside the point under Tyler Bros. EAJA does not, like the Federal Tort Claims Act, make what the Government, through its agents, did or failed to do before litigation the principal concern. Rather, EAJA is restricted to a consideration of the Government's position with respect to the litigation once it has ensued.

III.

We also hold that the Government has shown a "reasonable basis both in law and

fact" for its position at both the trial and appellate levels of these cases. The successful petitioners first complain that the Government's original factual position was not substantially justified. They note that, when the Navy extended Amidon and Lajoie's enlistments, it claimed to hold the men for Spanish authorities pursuant to its obligation under the Agreement, even though Spanish authorities then had disclaimed jurisdiction. Although Spain had deferred to United States jurisdiction, it certainly was unclear whether Spain could or would reassert its jurisdiction. The Government claims that it interpreted the Agreement to require it to hold the men until that determination had been made. The factual basis for the Government's position, then, was not, as the three contend, that Spain

had jurisdiction, but that it thought the Agreement obliged it to hold the men. The Government's factual and legal positions at the district court level thus must stand or fall together.

We consider the Government's legal position that the Agreement's language arguably required the Navy to detain them as individuals over whom Spanish jurisdiction is to be exercised" was reasonable, though not persuasive, on its face. The State Department supported this interpretation, saying:

> A good faith implementation of our obligations under the Agreement requires that U.S. military authorities provide the Government of Spain with a reasonable opportunity to determine whether it wishes to exercise jurisdiction. Removal of the petitioner[s] from Spain at this time, therefore, would be inconsistent with the Agreement, and harmful to

our relations with the Government of Spain. 2/

The State Department's endorsement of the Government's interpretation is further evidence of its reasonableness. We therefore hold that the Government was substantially justified in seeking a judicial resolution of the question.

The Government failed, of course, to consider that it lacked the authority to hold the men in order to extend to the Government of Spain the opportunity to exercise its jurisdiction. The Government did not read the Agreement to require an independent basis for it to detain servicemen, and it did not read the relevant portion of BUPERSMAN as invalid

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2/ Letter from James H. Michel, Deputy Legal Adviser, Department of State, to the district court (April 29, 1981).

under 32 C.F.R. § 700.1201. It is significant that, while neither of those considerations occurred to the Government prior to the oral argument before the Fourth Circuit panel in Amidon, they also had not occurred to the district court or to Amidon, Lajoie or Elwood. They were raised initially by us, and as subsequent proceedings demonstrated, they were not self evident.

In a petition for rehearing, the Government argued that we had misconstrued the Agreement and the Code. First, it maintained that "a member of the United States personnel in Spain, who is legally subject to detention by the military authorities of the United States" was intended only to differentiate between civilian and military personnel. Noting that Spain and the United States formerly

had an agreement covering both civilian and military personnel, the Government said the renegotiated agreement used the quoted language because American judicial decisions had held military detention of civilian personnel illegal. Second, the Government contended that 32 C.F.R. § 700.1201, which invalidates any BUPERSMAN article that amends "any provision of Navy Regulations," referred only to United States Navy Regulations, which are adopted by the Secretary of the Navy, and not to the navy regulation that the BUPERSMAN article at issue "amended." In support of this theory, it cited a number of cases distinguishing the specific from the generic use of "navy regulations."

We were not impressed by these arguments, and we denied the petition for

rehearing. Yet the arguments are not unreasonable. Thus, we conclude that the Government's position throughout this litigation has been substantially justified. We therefore reverse the district court's fee awards.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KENNETH R. AMIDON,	:	CIVIL ACTION
	:	
Petitioner	:	
v.	:	
	:	
JOHN F. LEHMAN, JR., et al.,	:	
	:	
Respondents	:	No. 81-0394-A

ORDER

AND NOW, this 13th day of October 1982, upon consideration of the Application of Kenneth R. Amidon, the Stipulation of the parties as to the hours and expenses reasonably expended, and for the reasons enunciated at the hearing of this matter on September 17, 1982, Petitioner is hereby awarded attorneys' fees and expenses pursuant to the Equal

Access to Justice Act, 28 U.S.C. §2412(d), totalling $8,184.36.

BY THE COURT:

/s/ Richard L. Williams
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

DONALD H. LAJOIE,	:	CIVIL ACTION
Petitioner	:	
v.	:	
CASPAR W. WEINBERGER, et al.,	:	
Respondents	:	NO. 81-0365-A

ORDER

AND NOW, this 13th day of October 1982, upon consideration of the Application of Donald H. Lajoie, the Stipulation of the parties as to the hours and expenses reasonably expended, and for the reasons enunciated at the hearing of this matter on September 17, 1982, Petitioner is hereby awarded attorneys' fees and expenses pursuant to the Equal

Access to Justice Act, 28 U.S.C. §2412(d), totalling $8,091.90.

BY THE COURT:

/s/ Richard L. Williams
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JAMES M. ELWOOD,	:	CIVIL ACTION
	:	
Petitioner	:	
	:	
v.	:	
	:	
JOHN F. LEHMAN, JR., et al.,	:	
	:	
Respondents	:	NO. 82-0092-A

ORDER

AND NOW, this 21st day of October 1982, upon consideration of the Application of James M. Elwood, the Stipulation of the parties as to the hours and expenses reasonably expended, and for the reasons enunciated at the hearing of this matter on September 17, 1982, Petitioner is hereby awarded attorneys' fees and expenses pursuant to the Equal

Access to Justice Act, 28 U.S.C. §2412(d), totalling $8,488.10.

BY THE COURT:

/s/ Richard L. Williams
J.

Relevant Portions of Transcript (pp. 13-14) Recording District Court Opinion on EAJA Applications

THE COURT: Well, you have gone on long enough. But let me tell you what the law has to be on that, whether you are substantially justified or not, because I have done a lot of work in this area, and it causes me no problem at all. And I am going to give you another neat position to get heard on in the Fourth Circuit. And that is that the Navy's position, nor any other litigant's position, can ever be substantially justified where the reason for the litigation flows from some prior negligent handling of a case.

Here the three defendants could have been left in the hands of the Spanish authorities for prosecution, but the Navy elected not to do so. When the Navy asked

to have jurisdiction transferred, it should have realized the speedy trial act problems and acted accordingly. And they didn't do it. So, they can't say "that we were substantially justified" where their own negligent handling of the case was the reason for the litigation. Now, that doesn't do violence to the substantially justified requirement at all, but it's very seldom that you get a case where the negligent handling of a case precipitates the litigation that you got involved in. And that's going to be my ruling, and I am going to rule on the whole thing here today. But, let me hear from the Navy. And I am going to, after I rule, because I have written on this extensively, and if you had done all your homework you would have read my prior opinions, and I laid down a recipe, and then have you come back

in here with an agreed upon figure so that you are going to have a room service package to take this case back to the Fourth Circuit for the third time if you by this time aren't fed up with it.

Proceed

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KENNETH R. AMIDON,	)	
	)	
Petitioner	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 81-0394-A
JOHN F. LEHMAN,	)	
Secretary of the	)	
Navy, et al.,	)	

MEMORANDUM OPINION

I. STATEMENT OF FACTS

The petitioner is a member of the United States Navy. His enlistment was for a four year period of active duty with a one year extension which was to expire March 23, 1981. After that date he was to remain on inactive duty in the Naval Reserves.

In February of 1980 a member of the United States Navy was found dead and

presumed murdered in Rota, Spain. On March 3, 1980 the petitioner and two other American sailors -- all of whom were stationed at Rota -- were taken into custody by United States government agents in connection with the alleged murder. On March 5, 1980 the three were transferred to Spanish custody and taken before a Spanish judge. They were returned to American custody because, although both the United States and Spain had jurisdiction over the case, the United States had primary jurisdiction and, thus, the primary right to prosecute.

The American charges against all three were dismissed, however, on July 11, 1980 on the grounds that the defendants had been denied the right to a speedy trial. That decision has been upheld through a series of appeals and collateral

attacks, the last decision having been issued March 19, 1981.

Despite the March 23, 1981 date for completion of petitioner's active duty, he has been retained since then involuntarily on active duty and, until ordered back to this country by this court, was stationed in Rota, Spain. Because being stationed there subjected the petitioner to possible Spanish prosecution, he has filed this application for a writ of habeas corpus asking the court to declare his involuntary retention unlawful and to order the Navy to release him from active duty. Jurisdiction is vested in this court by 28 U.S.C. §2241.

The court on May 6, 1981 determined that the petitioner's claim presented only issues of law and denied the petitioner's request for an evidentiary hearing.

Petitioner subsequently filed a motion for summary judgment and a hearing on that motion was held. After that hearing the respondents filed a cross motion for summary judgment and waived oral argument.

II. DISCUSSION

When a crime has allegedly been committed by a member of the United States military on foreign soil, there is concurrent jurisdiction between the United States military courts and the civil courts of the foreign country. In order to determine which is to prosecute, the United States and Spain have executed a document entitled "Agreement between the United States of American and Spain Implementing Article V of the Treaty of Friendship and Cooperation of January 24, 1976." (This document for simplicity's

sake will be referred to as the "Agreement").

Under the terms of the Agreement, the United States has primary jurisdiction and Spain has secondary jurisdiction over "offenses solely against the person . . . of a member of the United States Personnel in Spain." Since the alleged murder was of a member of the United States Navy by other members of the Navy, this provision invested the United States military with primary jurisdiction.

The Agreement provides that if Spain wanted the United States to waive its jurisdiction to allow Spain to prosecute, a waiver of primary jurisdiction can be requested within 15 days of the assertion of jurisdiction by the United States. Spain did not request such a waiver.

When either the United States or Spain has executed its jurisdiction, it must notify the other sovereign of the disposition of the matter. Also, the Agreement specifically provides that if an accused "has been tried in accordance with the provisions of this Agreement . . . and has been acquitted, or has been convicted, . . . or he has been pardoned, he may not be tried again for the same offense within the territory of Spain by the authorities of the other State."

The respondents assert that the dismissal of these charges was not an acquittal, conviction or pardon and, therefore, the double jeopardy provision does not bar a Spanish prosecution of the petitioner. Accordingly, until order to return him to this country pending resolution of his application for a writ

of habeas corpus, the Navy was keeping the petitioner stationed on active duty at the Naval Station in Rota, Spain in case Spanish authorities elected to prosecute.

The Agreement requires the United States to maintain custody of a member of the United States personnel in Spain "who is legally subject to detention by the military authorities of the United States and over whom Spanish jurisdiction is to be exercised, at their request."

The petitioner was first arrested by United States military authorities on March 3, 1980. Two days later he was taken into Spanish custody and a Sumario, a Report of Investigation, was issued by the Judge of the Court of Instruction of Puerto de Santa Maria. That judge also requested that United States naval authorities keep the three accused in

custody "with the commitment of keeping them in Spain until the resolution of this proceeding."

On May 6, 1980, the Spanish Mixed Commission, made up of Spanish judicial and military authorities, and whose job includes determining jurisdictional questions of this kind, determined that the United States had primary jurisdiction over the matter and gave control of the case to the United States military authorities.

The petitioner's application is premised, inter alia, on the grounds that his period of enlistment for active duty expired March 23, 1981 and the Navy's retention of him on active duty is unlawful. The asserted authority for the extension is Article 3840260(5)(h) of the Bureau of the Naval Personnel Manual

(BUPERSMAN), which says that a service member's active duty period can be involuntarily extended "as a result of apprehension, arrest, confinement, investigation, or filing of charges, . . . that may result in trial, because of [an] offense committed within the criminal jurisdiction of the civil authority concerned, by a member, prior to a legal discharge or separation." In order to support the applicability of BUPERSMAN 384 3840260(5)(h), the government asserts that Article XVIII of the Agreement requires the United States to maintain custody of the petitioner. That Article provides:

> The custody of a member of the United States Personnel in Spain, who is legally subject to detention by the military authorities of the United States and over whom Spanish jurisdiction is to be exercised, shall be the responsibility of the United States military authorities,

> at their request, until the conclusion of all judicial proceedings, at which time the member will be delivered to Spanish authorities, at their request, for execution of the sentence.

This court, therefore, is faced with the difficult task of determining whether "Spanish jurisdiction is to be exercised" over the petitioner. The petitioner claims that, at best, Spanish jurisdiction may be exercised or attempted, but that that is insufficient to meet the terms of the Agreement and thus cannot support the involuntary extension.

The Navy has in different proceedings involving the petitioner taken inconsistent positions on this question. In its "Reply to Speedy Trial Motion" filed with the Transatlantic Judicial Circuit General Court-Martial in Rota, Spain, the Navy, in its factual statement,

said that the Spanish charges "remained in effect until 6 May 1980, when the Spanish Mixed Commission in Madrid . . . determined that this case was one where the United States had a primary right to exercise jurisdiction, and, therefore, gave control of the case to the diction, and, therefore, gave control of the case to the United States Authorities." In the present proceedings, however, the Navy claims that since there has been no conviction, acquittal or pardon, Spain, having originally filed charges against the petitioner which were never dropped, still has jurisdiction which has never been extinguished.

An analysis of the Spanish legal proceedings reveals that the Sumario, which contains evidence collected by the Spanish judge, is the document used to

indicate that petitioners were involved materially in the alleged murder. This Sumario was sent to the Mixed Commission, and from there to the United States military authorities when a decision was made on primary jurisdiction. Without the Sumario, the Spanish court could proceed no further.

Spanish Royal Decree Law 12/76, which implements the Spanish jurisdictional rights and limitations under the Agreement, provides that when it appears that an accused in a Spanish proceeding is a member of United States personnel in Spain:

> . . . the judicial body shall provide, in any instance and in an urgent manner, the indispensible proceedings [necessary] to secure the evidence of the facts and to determine the responsibility [of the party], without prejudice and to immediately notify

> the Joint Commission on Competence [the Mixed Commission] . . . of the initiation of the proceedings and of the crime or misdemeanor which originated [the proceeding] and they [the Spanish Judges and Tribunals] shall continue the proceedings until they receive the corresponding resolution from the Joint Commission on Competence.

Id., Art. 3.

The Navy asserts that this Royal Decree Law supports its position that the Spanish proceedings, begun in March of 1980, are still pending, awaiting "the corresponding resolution" of the Mixed Commission. However, a more reasonable interpretation of this provision is that the charges are continued pending the resolution of the Mixed Commission regarding primary jurisdiction. That resolution was made in May of 1980. Under that interpretation, the case no longer would be continued.

It is important to note that the Fiscal General of Spain, which the Navy has described as being roughly equivalent to the United States Solicitor General, when asked if the charges against the petitioners were still pending under Spanish law, said that from the date of the Mixed Commission's resolution "the Spanish judicial authorities lost their jurisdiction and ceased all prosecutorial activity related to the . . . offense." The court finds this analysis to be highly persuasive since this court has no expertise in interpreting Spanish law.

The government, which is to be commended for bringing the Fiscal General's letter to the attention of the court, attempts to lessen its impact, however, by asserting that it is an interpretation of Spanish domestic law and

not one interpreting the Agreement. However, it is Spanish domestic law which determines whether Spanish civil charges are outstanding. Despite that, the court disagrees with the government's characterization anyway. The letter makes clear that the Fiscal General fully considered the effect of the Agreement on Spanish domestic law.

All of the evidence indicates to the court that once primary jurisdiction was decided in favor of the United States, the Spanish authorities considered the matter to be closed as far as their judicial system was concerned.

The evidence also indicates, however, that the Spanish authorities are evaluating their position and may attempt to pursue prosecution again. No decision has apparently yet been made. If the

cases are pursued, however, according to the interpretation of the Fiscal General, and the Mixed Commission decides that Spanish prosecution is warranted, the Spanish judicial authorities will at that time only "recover" jurisdiction.

But, even if the decision to prosecute was made today, the important fact is that it had not been made on March 23, 1981, the date on which the petitioner's active duty enlistment expired. Thus, his involuntary extension could not have been justified by an obligation to hold the petitioner as one over whom Spanish jurisdiction <u>is</u> to be exercised. This court agrees with the petitioner that at best jurisdiction <u>may</u> be exercised. Thus, since the premise on which the Navy based its extension of the petitioner's active duty was invalid, the involuntary extension itself is invalid.

For this reason, the petitioner's writ of habeas corpus is granted and the respondents are ordered to release petitioner from active duty with the Navy.

Because of the disposition the court makes on this issue, it is necessary to address the other grounds asserted by the petitioner.

An appropriate order will issue.

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

DATE: June 22, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KENNETH R. AMIDON,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 81-0394-A
JOHN F. LEHMAN, JR., et al.,	)	
	)	
	)	
Respondents.	)	

ORDER

In accordance with the Memorandum Opinion filed this day, the court having considered the Application of Kenneth R. Amidon for a Writ of Habeas Corpus, and having viewed the facts of record most favorably to Respondents, and having considered the briefs and oral arguments of the parties, it is hereby ORDERED and DECREED, that on or before July 1, 1981, Petitioner Kenneth R. Amidon shall be

released from active duty in the United States Navy Reserve in accordance with applicable Navy Directives.

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

DATE: June 22, 1981

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Amidon, et. al.	:	
	:	
Appellees	:	Nos. 81-1748
	:	81-1841
v.	:	
	:	
Lehman, et. al.	:	
	:	
Appellants	:	

CHAPMAN, Circuit Judge:

In February of 1980 appellees Kenneth R. Amidon and Donald H. Lajoie were members of the United States Navy stationed in Rota, Spain. Amidon's active duty enlistment was to expire on March 23, 1981, Lajoie's on August 18, 1981. On March 3, 1980 appellees and one other service member, James M. Elwood, were taken into custody by United States government agents in connection with the alleged murder of a fellow sailor in

Spain. On March 5, 1980 the three sailors were transferred to Spanish authorities and taken before a Spanish judge. Because the United States had primary jurisdiction over the prosecution pursuant to "The Agreement in Implementation of the Treaty of Friendship and Cooperation between Spain and the United States of America" (hereafter "The Agreement"),[1/] appellees

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1/ Article XV, ¶ 3(a)(1) provides in part:

> For the sole purpose of determining whether an act or omission is a punishable offense under the law of Spain or under the military law of the United States, or both, the interpretation of the law of Spain by the Spanish authorities shall be accepted by the Government of the United States, and the interpretation of the military law of the United States by the authorities of the United States shall be accepted by the Spanish authorities. When, by application of the foregoing provisions, it is determined that an act or omission is a punishable (continued)

were returned to United States authorities.

The Navy began its prosecution, but all United States charges were dismissed on July 11, 1980 on the ground that the Navy had failed to provide a speedy trial as required by Title 10 U.S.C. § 810. On

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offense under both the law of Spain and the military law of the United States, thereby giving rise to concurrent rights to exercise jurisdiction, the following rules shall be applied:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over United States Personnel in Spain subject to the military law of the United States for the following offenses punishable under such law:

(1) offenses solely against the property or security of the United States, or offenses solely against the person or property of a member of the United States Personnel in Spain . . . .

March 19, 1981 the Court of Military Appeals upheld the dismissal of charges.

Despite the March 23, 1981 expiration date of Amidon's active duty enlistment, the Navy detained him in Spain, involuntarily extending his period of active duty. Because further detention in Spain subjected him to possible prosecution by Spanish authorities, Amidon in late April 1981, petitioned the district court for a writ of habeas corpus (28 U.S.C. § 2243), seeking his return to the United States and release from active duty. Anticipating that a similar extension would be imposed upon his enlistment, Lajoie petitioned for the same relief, effective upon expiration of his active duty enlistment.

The district court granted appellees' petitions for habeas corpus, ordered the

Navy to return them to the United States and to release them from active duty. Appellees were returned to this country, but the order to release them from active duty was stayed pending this appeal. We affirm the granting of the writ but for reasons different from those announced by the district court.[2/]

The Navy asserts that its authority to hold appellees rests in the Agreement. Article XVII, ¶ 3 of that document provides in pertinent part:

> The custody of a member of the United States Personnel in Spain, who is legally subject to detention by the military authorities

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2/ Elwood also petitioned for a writ of habeas corpus. This court recently affirmed the denial of habeas relief in Elwood v. Lehman, 81-169 (decided January 1982). Elwood's case, however, turned on the validity of a voluntary extension, not an involuntary extension.

> of the United States and over whom Spanish jurisdiction is to be exercised, shall be the responsibility of the United States military authorities, at their request, until the conclusion of all judicial proceedings, at which time the member will be delivered to Spanish authorities at their request for execution of the sentence . . . . (Emphasis added).

The United States has, therefore, agreed to hold its personnel for Spanish authorities when two conditions are met. First, the Navy must have independent authority to detain the service member. Second, a determination must be made that Spanish jurisdiction is to be exercised.

The only issue before this court is whether the Navy has authority to detain the appellees. Standing alone, the Agreement provides no such authority. Article XVIII of that document merely describes one situation in which the

United States has agreed to exercise its authority to detain a service member. The Agreement clearly contemplates that such authority is to have an independent source. If appellees are legally subject to detention by the Navy, additional authority under the Agreement is not necessary. If appellees are not legally subject to detention, the Agreement does not require further inquiry.

Unfortunately the Navy, in the district court and here, has maintained that its authority to detain appellees is Article XVIII of the Agreement. The district court was steered off course by the government's misplaced argument and based its opinion on a finding that "involuntary extension could not have been justified by an obligation to hold petitioner[s] as one over whom Spanish

jurisdiction is to be exercised," the second condition in the Agreement [emphasis in original].

We must, therefore, examine whether the Navy has independent authority to detain appellees.

Article 38040260(5)(h) of the Bureau of Naval Personnel Manual (hereafter BUPERSMAN) purports to authorize involuntary extensions of enlistment periods for various reasons, one of which is "[a]s a result of apprehension, arrest, investigation or filing of charges . . . by civil authorities that may result in trial . . . ." Title 32 CFR §730.4(e) also purports to set out reasons enlisted personnel may be held beyond their enlistment term. Section 730.4(e) does not include the above quoted reason found in the BUPERSMAN. In all, ten reasons

for enlistment extension are listed in §730.4(e). The same ten reasons plus the above quoted language are reproduced in the BUPERSMAN, Article 38040260(5).

While it is true that § 700.1202 of Title 32 provides authority for the Chief of Naval Personnel to issue the BUPERSMAN, that authority is limited by § 700.1201.[3/] Section 700.1201 makes it clear that manuals "issued within the

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3/ § 700.1201 Purpose and force of United States Navy Regulations.

United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, authority, distinctions, and relationships of various commands, officials, and individuals. Other regulations, instructions, orders, manuals, or similar publications, shall not be issued within the Department of the Navy which conflict with, alter or amend any provision of Navy Regulations.

Department of the Navy which conflict with, alter or amend any provision of Navy Regulations" are to have no effect.

Section 730.4(e) purports to set out all the grounds upon which enlistments may be extended. By including the additional ground of involuntary extension as a result of apprehension, arrest, confinement, investigation, or filing of charges . . . by civil authorities that may result in trial . . ." the BUPERSMAN has significantly amended the regulation.

The portion of Article 38040260(5)(h) dealing with charges, etc. by civil authorities is, therefore, without effect. The Navy has no authority to extend appellees' enlistments based on that Article.

Appellees not being legally subject to detention by the Navy, the only issue

we must resolve, we affirm the district court's grant of habeas relief.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JAMES M. ELWOOD,	:	CIVIL ACTION
Petitioner,	:	
v.	:	
JOHN F. LEHMAN, JR., et al.,	:	
Respondents.	:	NO. 82-0092-A

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. FACTS

Petitioner James M. Elwood enlisted in the Navy for four years commencing February 4, 1977. (Appendix, p. 1). At the time he executed his initial enlistment contract he also executed a one-year enlistment extension (Appendix, p. 1) which he would become obligated to serve upon completion of BU Class "A"

School. (Appendix, p. 1). His obligated active service pursuant to his original enlistment expired on February 3, 1981. (Appendix, p. 2). The one year extension expired on February 3, 1982. In March of 1980, while in Spain pursuant to military orders, Elwood and two other sailors were charged with murder and related offenses by both the Spanish and United States authorities. (Appendix, p. 2). The United States advised the Government of Spain that in accordance with the Agreement in Implementation of the Treaty of Friendship and Cooperation between Spain and the United States (hereinafter referred to as the "Status of Forces Agreement"), the United States was asserting its primary right to exercise jurisdiction. (Appendix, p. 6). Contemporaneously with its assertion of

the primary right to exercise, the United States requested and undertook to maintain custody over Elwood, Amidon and Lajoie on behalf of Spain as set forth below.

> In accordance with the provisions of Article 18 Paragraph 3 of the Agreement in Implementation of the Treaty of Friendship and Cooperation between Spain and the United States of America of January 24, 1976, I hereby request the right to exercise the custody over the North Americans, military members cf the United States Forces in Spain, JAMES MICHAEL ELWOOD, KENNETH RICHARD AMIDON and DONALD HAROLD LAJOIE, detained at your disposition in Rota Jail House.
>
> In case that the custody status is granted, I inform you in advance that it shall consist, in the present case, in the imprisonment of the aforecited detainees within the Correctional Center of the United States Armed Forces in this Naval Base where they will remain at your disposition, as many times as their appearance be

> required by Your Honor, and until the jurisdiction in favor of the United States Authorities, in this case, be determined. (Appendix, p. 8). (emphasis added).

The judge of the Spanish court having cognizance of the charges over Elwood, Amidon and Lajoie, ordered that the United States maintain custody and keep them in Spain only until the resolution of the proceedings before him. (Appendix, p. 9). On March 20, 1980, the Spanish judge considered that Spanish jurisdiction would not apply in these cases, referred the cases to the Spanish Mixed Commission on Jurisdiction and declared the Spanish criminal proceedings against Amidon and Lajoie to be concluded. (Appendix, p. 13). On April 29, 1980, the Spanish Mixed Commission on Jurisdiction formally resolved that Spain waive its jurisdiction of Amidon and Lajoie in favor of the

United States military authorities (Appendix, p. 15). As of that date, the Spanish judicial authorities lost their jurisdiction and ceased all prosecutorial activity related to the cited. (Appendix, p. 15).

As of May 9, 1980, upon receipt of notification of the Spanish decision by the United States, Elwood and the two other sailors were no longer constrained or confined pursuant to the Spanish court order and treaty obligation. (From March 5 until May 9, 1980, Elwood had been confined by reason of the Spanish court order and the treaty obligation.) (Appendix, p. 18).

On July 11, 1980, the trial of Elwood by general court-martial commenced at which time the military judge, upon motion of the accused, dismissed all charges

against Elwood due to a lack of speedy trial. (Appendix, p. 2). Elwood had been retained in Spain on temporary additional duty for purposes of disciplinary action only. (Appendix, pp. 19, 20). Despite repeated requests by Elwood, naval authorities refused to send him back to the United States but kept him in Spain. (Appendix, p. 2).1/

1/ In military judicial proceedings involving Amidon, the Navy has expressly taken the position that after the waiver of jurisdiction by Spain and the completion of court-martial proceedings, there would be no legal impediment to his transfer from Spain. (Appendix, p. 22).

Since April of 1981, Elwood has been serving with the Personnel Support Activity Detachment, Building 72, Anacostia Naval District Washington, Washington, D.C. 20374. The Navy agreed to retain Elwood in the United States to obviate premature litigation on the propriety of his retention.

On March 25, 1981, the Joint U.S. Military Group, Military Assistance Advisory Group (JUSMG-MAAG) were advised by higher headquarters to provide Spain with notification of the disposition of the charges against Elwood, Amidon and Lajoie pursuant to paragraph XX(3) of the Status of Forces Agreement. JUSMG-MAAG was further specifically instructed that the "notification to the Spanish should be done in the normal manner and should not be accompanied by any U.S. requests for special consideration by the Spanish of this case." (Appendix, p. 20).2/

2/ On April 22, 1981, the Secretary of the Spanish Mixed Commission acknowledged that the Commission had recognized that the "United States cannot take a position for or against Spanish Exercise of jurisdiction." (Appendix, p. 23).

In response to a specific request precipitated by the Amidon litigation, the Prosecutor General of Spain opined on May 28, 1981, that Spain would not be able to recover jurisdiction over Elwood, Amidon and Lajoie and bring them to trial unless the Spanish Mixed Commission revoked its resolution of April 29, 1980. (Appendix, p. 24). On June 11, 1981, the Spanish Mixed Commission on Jurisdiction advised the Prosecutor General that there was no possibility that the April 29, 1980 resolution would be changed. (Appendix, p. 26).

At the time the Prosecutor General advised the United States military authorities of the latest action by the Mixed Commission, he also further advised them as follows:

Inasmuch as the victim was a U.S. citizen and the aggressors had the same nationality, if guarantees are received that the above-mentioned Amidon, Elwood and Curtis (sic) would be repatriated and would not return to Spain, this office of the Prosecutor General would not have any interest in asking that the Spanish Government request from the U.S. Government the return of jurisdiction concerning the case as well as the expression of your preference to exercise said jurisdiction, in accordance with Article XVII of [the Status of Forces Agreement].

In the event that the guarantees referred to in the paragraph above are not received...this Office of the Prosecutor General of the State will address the Spanish Government so that...they request that the United States waive the rights derived from the resolution of the Mixed Commission on Jurisdiction concerning the case and make delivery to the Spanish judicial authorities of the three above-mentioned individuals so that they may be tried in Spain." (Appendix, p. 27, 28).

Even though the conditions requested by the Prosecutor General had already occurred and despite the express policy of the Department of Defense (Appendix, p. 29) as mandated by the Senate (Appendix, p. 39), to protect servicemembers from the exercise of foreign jurisdiction (particularly in cases where they may be deprived of such fundamental rights as the lack of speedy trial), the United States military authorities declined, without stating any reason, to advise the Prosecutor General that Elwood, Amidon and Lajoie had already been repatriated and to give him assurances that the Navy wouldn't send them back. (Appendix, p. 43).

Not only did the United States military authorities decline to give the most rudimentary of guarantees to Spain, but without request, they renounced the

United States' rights to jurisdiction including those obtained by the Spanish action on April 29, 1980; they advised the Prosecutor General that they deemed it appropriate for Spain to try Amidon and Lajoie and they expressly requested that Spain do so. (Appendix, p. 44). On October 20, 1981 the Mixed Commission decided to accept this renunciation but only "in view of the fact that the Chief of JUSMG ... request[ed] that the renunciation of the primary right of jurisdiction of the United States authorities be accepted." (Appendix, p. 45).

On February 2, 1982, the Command at which Elwood is presently serving took action to involuntarily extend his enlistment and made the following administrative entry in his service record book:

> Held beyond normal date of expiration of enlistment (3FEB82) in a discipline status pending disposition of Spanish criminal charges. Summons from Spanish court of instruction received by COMNAVACT, ROTA, SPAIN on 5JAN82 requiring SNMBR's presence before Spanish Judge to answer to Spanish criminal charges. Article 5 of Treaty of Friendship and Cooperation between U.S. and Spain provides for Spanish jurisdiction. That Treaty and NAVMILPERSMAN Article 3840260.5h authorize extension of enlistment.

On February 4, 1982, upon Elwood's Application for a Writ of Habeas Corpus, the Secretary of the Navy and Chief of Naval Operations were ordered to show cause why Elwood should not be released from active duty in the Navy. Elwood's Application raises many serious constitutional questions for which the Court will require a fully developed factual record. Among those issues are the following:

(1) Whether, under the Status of Forces Agreement, Spain has acquired the right to exercise jurisdiction over Elwood?

(2) Whether officials of the United States have the authority to renounce the rights of American citizens guaranteed by the Status of Forces Agreement with Spain?

(3) Whether the acts of officials of the United States to effect the prosecution of Elwood by Spain contravene the policy of the United States to minimize foreign jurisdiction over servicemen as mandated by the Senate?

(4) Whether the acts of officials of the United States to effect the prosecution of Elwood by Spain erode the mandated sanction for the denial of the right to a speedy trial?

(5) Whether the acts of officials of the United States to effect the prosecution of Elwood

by Spain have an impermissible chilling effect on the exercise of constitutional rights?

(6) Whether the Navy is estopped from relying on the pendency of Spanish civil charges as a ground for involuntary enlistment extension by reason of the improper acts of United States officials?

(7) Whether civil charges can be relied upon by the Navy as a ground for involuntary enlistment extension, where the Navy is without authority to transfer custody of the servicemember to Spain?

(8) Whether the Status of Forces Agreement with Spain addresses the question of the delivery of American servicemembers from the United States to Spain?

(9) Whether the Status of Forces Agreement with Spain is an Extradition Treaty in the Constitutional sense?

(10) Whether the provisions of 18 U.S.C. §3181 *et seq*. apply?

(11) Whether the return of petitioner to Spain would contravene the Extradition Treaty with Spain?

Although it would be necessary to resolve all of the above issues against Elwood before his Application could be dismissed, the parties have agreed at the February 12, hearing that resolution of the following purely legal issue in favor of Elwood would be dispositive:

> Does the Navy have the legal authority to involuntarily extend the enlistment of an enlisted sailor, serving in the United States, by reason of criminal charges of a non-military nature pending before a Spanish court?

Upon that issue and for the reasons set forth hereinafter. Elwood is entitled to the entry of judgment in his favor.

II. SUMMARY OF ARGUMENT

James M. Elwood has served the Navy for over 5 years and beyond the period contracted for by the Navy. The Navy is continuing to require Elwood to serve and Elwood has no remedy to rectify this illegal detention. The service of our citizens in the armed forces is purely a matter of domestic law and a subject over which foreign nations have no rights or interests. As a matter of law, James M. Elwood is entitled to be released from active duty for the following reasons:

A. On February 3, 1977, Elwood had a vested right to be released from active duty on March 26, 1981 subject only to the existing valid regulations and statutory exceptions. This vested right could not be abrogated by application of an Executive Agreement purporting to implement a treaty.

B. The Status of Forces Agreement with Spain does not address involuntary enlistment extensions, and the practical construction of the provisions relied upon by the Navy negatives the position argued by the Navy herein.

C. The Status of Forces Agreement with Spain is not self-executing if construed to address enlistment extensions, because the power to make rules and laws relating to enlistment extensions is reserved to Congress.

D. Promulgation of a regulation permitting involuntary extensions of enlistments by reason of pending civil charges, even if within the competence of the Executive Branch, would be required to be published in the Federal Register on a current basis to be binding.

E. MILPERSMAN Article 3840260.5(h) is unconstitutionally overbroad.

No. 84-114

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH R. AMIDON, DONALD H. LAJOIE AND JAMES M. ELWOOD, PETITIONERS

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether, in determining that "the position of the United States" was "substantially justified" so as to preclude an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), the court of appeals correctly looked to the government's position in this lawsuit rather than to its prelitigation actions that precipitated petitioners' habeas corpus petitions.

2. Whether the court of appeals applied the correct standard of appellate review in this case.

3. Whether, in determining that the position of the United States was substantially justified, the court of appeals was required to evaluate arguments raised by petitioners in the district court but not decided by that court.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-114

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 730 F.2d 949. The oral opinion and orders of the district court (Pet. App. 18a-26a) are unreported. The opinion of the court of appeals in the underlying litigation (Pet. App. 46a-56a) is reported at 677 F.2d 17. The district court's opinion and order in the underlying litigation (Pet. App. 27a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1984, and a petition for rehearing was denied on March 2, 1984. The petition for a writ of certiorari was filed on May 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1980, petitioners were members of the Navy stationed on active duty in Rota, Spain. At that time, all three petitioners were implicated in the death of a fellow sailor. Because of statutory speedy trial requirements, the Navy was unable to court-martial petitioners for their alleged involvement in the murder.[1] The Navy believed, however, that Spain retained jurisdiction to bring criminal proceedings against petitioners pursuant to the terms of an agreement with the United States. Agreement in Implementation of the Treaty of Friendship and Cooperation Between Spain and the United States of America of January 24, 1976, 27 U.S.T. 3098 *et seq.*, T.I.A.S. No. 8361 [hereafter cited as *Agreement*]. The Navy also believed that it was obligated under the *Agreement* to ensure petitioners' availability for any legal proceedings Spain might choose to bring.[2] Accordingly, when petitioners' periods of active duty were due to expire, the Navy ordered them involuntarily extended in order to preserve Spain's option to prosecute. Pet. App. 3a, 29a, 49a-50a.

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[1]Under Article 10 of the Uniform Code of Military Justice, 10 U.S.C. 810, a member of the military who is charged with an offense punishable by court-martial and who is arrested or confined prior to trial ordinarily must be brought to trial within 90 days of his initial confinement. See *United States* v. *Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971). In petitioners' cases, the military courts held that the Navy's need to complete another court-martial proceeding being held in Rota prior to trying petitioners did not toll the running of the 90-day period for purposes of compliance with Article 10. See Pet. App. 28a-29a, 48a-49a.

[2]Under the *Agreement*, the United States has "primary jurisdiction" over any offense committed by an American serviceman against another American serviceman. Art. XV, § 3.a(1), 27 U.S.T. 3113-3114. Spain, however, retains the authority to prosecute the serviceman if the United States either elects not to prosecute or brings criminal proceedings that do not result in a conviction, an acquittal, or a pardon. Art. XXII, 27 U.S.T. 3119.

Petitioners sought writs of habeas corpus in the United States District Court for the Eastern District of Virginia, challenging the Navy's involuntary extension of their active duty enlistments. Initially, the district court ordered petitioners' return to the United States pending resolution of their habeas corpus petitions. Thereafter, the court granted petitioner Amidon's petition for habeas corpus. The court held that the *Agreement*'s requirement that the United States retain custody over "a member of the United States Personnel in Spain * * * over whom Spanish jurisdiction is to be exercised" (Art. XVIII, § 3, 27 U.S.T. 3116) did not apply to petitioner Amidon because, as of the date his enlistment expired, Spain had not made a decision to prosecute. Pet. App. 27a-45a. Two months later, when the Navy extended petitioner Lajoie's active duty enlistment obligation, the district court granted his habeas corpus petition as well, relying on its prior decision in *Amidon* (Pet. 16).[3]

The court of appeals affirmed the district court's grants of habeas corpus relief for petitioners Amidon and Lajoie (Pet. App. 46a-56a). In so doing, however, the court of appeals relied upon a different theory than that employed by the district court. Specifically, the court of appeals held (*id.* at 51a-56a) that the phrase "legally subject to detention" in Article XVIII, § 3, of the *Agreement*, 27 U.S.T. 3116, required the existence of independent authority to extend petitioners' enlistments and that a provision of the Navy's personnel manual that had been utilized to effectuate the extensions was invalid because it was inconsistent with published Naval regulations.

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[3]Thereafter, on October 27, 1981, the Prosecutor General of Spain advised the United States that Spain had decided to exercise its jurisdiction to prosecute petitioners. On February 2, 1982, when petitioner Elwood's period of active duty was due to expire, the Navy extended it unilaterally. Like petitioners Amidon and Lajoie, petitioner Elwood sought and ultimately obtained habeas corpus relief.

2. Following the court of appeals' decision on the merits, petitioners sought attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). The district court granted petitioners' fee applications, rejecting the government's argument that its position had been "substantially justified" (Pet. App. 24a-26a). The court concluded that the "substantial justification" exception was inapplicable "where the reason for the litigation flows from some prior negligent handling of a case" (*id.* at 24a), apparently referring to the Navy's handling of the court-martial proceedings.[4]

On appeal, the court of appeals reversed the attorneys' fee awards, holding that the government's position in the litigation had been "substantially justified" (Pet. App. 1a-17a). Reaffirming the rule established in *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d 73 (4th Cir. 1982), the court of appeals first held that it is the government's position in the litigation, rather than its prelitigation actions, that must be substantially justified in order to preclude an award of attorneys' fees (Pet. App. 10a-11a). The court then determined that both the factual and legal bases of the government's case were the same — *i.e.*, a belief that the United States was obligated under the *Agreement* to hold petitioners for a reasonable period of time until Spain could determine whether to assert jurisdiction over them (*id.* at 12a-13a). Assessing the reasonableness of that interpretation of the *Agreement* (as well as of certain implementing regulations), the court concluded that it was "reasonable, though not persuasive, on its face" (*id.* at 13a). The court noted that

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[4]The district court also rejected the government's argument that the fee applications of petitioners Amidon and Lajoie were untimely because they were filed more than 30 days after the entry of judgment. See 28 U.S.C. 2412(d)(1)(B). Because it reversed on other grounds, the court of appeals did not reach this issue.

the Department of State had supported the Navy's interpretation of the *Agreement* and that the court of appeals' contrary reading of the *Agreement* was "not self evident" since it was based on considerations that had not occurred to either the parties or the district court (*id.* at 14a-15a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Petitioners urge the Court to resolve the conflict in the circuits over the meaning of the phrase, "position of the United States," as used in Section 2412(d)(1)(A) of EAJA. For the reasons stated in our brief in opposition in *Jarboe-Lackey Feedlots, Inc.* v. *United States*, No. 83-1916 (filed July 19, 1984), review of that issue is not warranted.[5] Nor do the other questions presented warrant review by this Court.[6]

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[5]We are furnishing a copy of our brief in opposition in No. 83-1916 to counsel for petitioners. The Court recently declined to review another decision raising the same issue. *Spencer* v. *NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, No. 83-981 (Apr. 16, 1984). In addition to the cases cited in our brief in opposition in No. 83-1916 (at 9-10 & n.5), we note that the Eighth and Eleventh Circuits have recently rendered decisions on the issue. The Eighth Circuit has adopted the interpretation of "position of the United States" advocated by petitioners (*Iowa Express Distribution, Inc.* v. *NLRB*, No. 83-1589 (July 11, 1984)), and the Eleventh Circuit has adopted the interpretation urged by the government (*Ashburn* v. *United States*, No. 83-7467 (Aug. 28, 1984)). The Eighth Circuit's discussion appears to be dictum, however, since the court also "observe[d] that the government's position has been consistent both at the prelitigation and litigation levels" (slip op. 7). As we note in the text, the same observation is applicable to nearly all EAJA cases, providing yet another reason why this Court's review is unnecessary.

[6]Review is unwarranted for the additional reasons that two of the three petitioners filed untimely fee applications (see page 4 note 4, *supra*), and EAJA does not apply to habeas corpus actions in any event. *Boudin* v. *Thomas*, 732 F.2d 1107, 1111-1115 (2d Cir. 1984).

1. a. Further review of the "position of the United States" issue is unwarranted because resolution of the conflict would not affect the result in this case. Petitioners have not demonstrated that the rule they seek would have changed the outcome here. As is true in all but a handful of cases, the government's litigation position was simply a defense of the underlying action that precipitated the court proceeding; accordingly, petitioners' entitlement to attorneys' fees would not be affected by any distinction between the government's litigation position and the underlying agency action. See, *e.g.*, *Houston Agricultural Credit Corp.* v. *United States*, 736 F.2d 233, 235 (5th. Cir. 1984); *Spencer* v. *NLRB*, 712 F.2d 539, 552 (D.C. Cir. 1983), cert. denied, No. 83-981 (Apr. 16, 1984). The government's justification for involuntarily extending petitioners' enlistments and its defense of that action were identical, *i.e.*, the Navy's belief, supported by the State Department, that the *Agreement* required it to hold petitioners for a reasonable period of time while the Spanish authorities decided whether to prosecute them. Accordingly, this is an inappropriate case for this Court to consider whether the "position of the United States" should be other than the government's litigation position.[7]

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[7]In our view, it is quite clear that the only prelitigation action of the Navy pertinent to this case was the involuntary extension of petitioners' periods of enlistment. It was that action that provided the sole basis for the filing of petitioners' habeas corpus petitions. The district court, however, appears to have considered the Navy's allegedly "negligent handling" of petitioners' court-martial proceedings as the relevant prelitigation action (see Pet. App. 24a-25a). The reasons for the Navy's inability to commence court-martial proceedings against petitioners within the 90-day period required by 10 U.S.C. 810 have nothing to do with the issues raised by petitioners in their habeas corpus petitions challenging the involuntary extension of their periods of enlistment. Accordingly, the district court's focus on the court-martial proceedings as the relevant prelitigation action was plainly wrong.

b. As we explained in our brief in opposition in *Jarboe-Lackey Feedlots, Inc.* v. *United States, supra*, Congress is aware of the issue raised by petitioners and is actively considering legislation that would define "position of the United States" in the statute itself. Section 2412(d) of EAJA will automatically expire on October 1, 1984, unless extended by Congress. 28 U.S.C. 2412 note. Bills are pending in the Senate and the House to extend the Act, and both include provisions that define "position of the United States." It is reasonable to assume that Congress will take action on the pending bills before the statutory expiration date. Thus, by the start of this Court's next Term, Congress will have either allowed the Act to expire or reauthorized it in a form that may well include a statutory definition of "position of the United States." In either event, the correct interpretation of the current statute would have become a matter of extremely limited importance. In these circumstances, we suggest that the Court should defer to Congress.

2. Petitioners' suggestion (Pet. 30-36) that further review is warranted because the court of appeals improperly engaged in fact-finding merits little discussion. Petitioners assert (Pet. 33, 34-35) that there were material facts in dispute in this case, but they fail to identify any such facts. In truth, there are none. As the court of appeals noted (Pet. App. 13a), the factual and legal bases of the government's position at all stages of this litigation were identical, *i.e.*, the Navy's belief that the *Agreement* obligated it to hold petitioners for a reasonable period of time, following dismissal of the court-martial proceedings, until Spain decided whether it would prosecute them. Accordingly, there were no factual issues requiring remand to the district court. Other circuits considering the question have recognized that whether a particular interpretation of the law is " 'plausable or colorable,' " and hence "substantially justified" within the meaning of EAJA, is a purely legal question that

may be determined de novo by an appellate court. *Boudin* v. *Thomas*, 732 F.2d 1107, 1117 (2d Cir. 1984) (quoting *Spencer* v. *NLRB*, 712 F.2d at 563).[8]

3. Finally, petitioners contend (Pet. 36-38) that the court of appeals' failure to require the government to show that its position was "substantially justified" with respect to certain issues raised in but not decided by the lower courts conflicts with decisions of the Third and Ninth Circuits. This alleged conflict simply does not exist.[9] Moreover, petitioners' failure to raise this point before the court of appeals,[10] as well as

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[8]Petitioners' reliance (Pet. 34) on *United States* v. *Cockrell*, 720 F.2d 1423 (5th Cir. 1983), is plainly misplaced. *Cockrell*, which did not arise under EAJA, involved a claim of ineffective assistance of counsel and the appropriate standard of review of the district court's resolution of that issue, including its judgment as to the reasonableness of certain strategic decisions made by counsel in litigation. 720 F.2d at 1426. Here, however, determining the reasonableness of the government's litigation position required the court of appeals to do no more than decide whether the Navy's interpretation of its obligations under an international agreement was "plausible or colorable" — a task an appellate court unquestionably is qualified to perform in the first instance. *Boudin* v. *Thomas*, 732 F.2d at 1117.

[9]In *Goldhaber* v. *Foley*, 698 F.2d 193 (3d Cir. 1983), and *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark*, 720 F.2d 1475 (9th Cir. 1983), cert. pending on other grounds, No. 84-267, the Third and Ninth Circuits held that under EAJA the government is chargeable for attorneys' fees attributable only to those discrete issues as to which its position was not substantially justified. In both cases, however, the district courts actually had adjudicated each of the issues for which fees were being sought. In the instant case, on the other hand, the district court — and therefore the court of appeals — concerned itself with only one dispositive issue. And in *Cinciarelli* v. *Reagan*, 729 F.2d 801, 807 (D.C. Cir. 1984), also relied upon by petitioners (Pet. 38), the issue on which fees were ultimately awarded was not decided by the district court only because the case was settled before any decision could issue. In these circumstances, neither *Cinciarelli* nor the other decisions cited by petitioners can be said to conflict with the decision below.

[10]Petitioners' only reference to this issue in the court of appeals consisted of a single sentence: "In order to sustain [the government's] legal position, all of the legal challenges raised thereto in this litigation

the fact that the decision below does not address the issue, strongly suggests that review by this Court would be inappropriate. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1984

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would have to be addressed." Br. for Appellees 17-18. This statement was unsupported by any authority and was located in the introduction to petitioners' discussion of the Navy's interpretation of the *Agreement* and its implementing regulations — the only legal issue that *was* decided in this case.

[11]In any event, the principle petitioners advocate is of dubious merit, since it would require appellate courts to decide issues never briefed by the parties in the abstract and advisory context of collateral attorneys' fee litigation.

DOJ-1984-09

No. 84-114

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SUPREME COURT OF THE UNITED STATES

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and JAMES M. ELWOOD,

Petitioners

v.

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JOHN F. LEHMAN, JR., SECRETARY OF
NAVY, and ADMIRAL THOMAS M. HAYWARD,
CHIEF OF NAVAL OPERATIONS,

Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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NO. 84-114

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

The Government has filed a Brief in which it argues that for a variety of

stated reasons the petition for a writ of certiorari should be denied. In contrast to the position it has taken in Spencer v. NLRB, No. 83-981 (cert. denied April 16, 1984) and Jarboe-Lackey Feedlots, Inc. v. United States, No. 83-1916, the Government no longer disputes the existence of a conflict in the circuits over the meaning of the phrase "position of the United States" as used in the Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412(d)(1)(A). The Government does argue, however, that the decision of the Fourth Circuit was correct; that resolution of the conflict would not affect the results in these cases; that because of pending legislation supporting the position urged by petitioners, this Court should decline to exercise its jurisdiction; that the Fourth Circuit did

not engage in improper fact-finding because there were no facts in issue; and that petitioners failed to raise before the Fourth Circuit, the third issue presented for review by this Court.[1/]

1/ The Government also suggests by footnote that review is unwarranted for the additional reasons that (1) the District Court erroneously rejected the Government's argument that the applications of Amidon and Lajoie were untimely and (2) EAJA does not apply in habeas corpus actions. The District Court's ruling on the timeliness issue is consistent with this Court's construction of the term "final judgment," in Bradley v. Richmond School Board, 416 U.S. 696 (1974), the decision of the Seventh Circuit in McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983) and the clear Congressional intent. See Senate Report, infra, at page 14. In regard to the applicability of EAJA to these habeas proceedings, that is not an issue here, never having been raised by the Government in either the district court or the court of appeals. Moreover, these are not prisoner cases or in any way civil/criminal hybrid cases as in Boudin v. Thomas, 732 F.2d 1107 (continued)

I. The Decision Of The Fourth Circuit Was Not Correct

In urging that the decision of the Fourth Circuit was correct, the Government has conveniently chosen to rely on a Brief which it filed with this Court in July to support its argument that "position of the United States" is limited to the Government's litigation position. By doing so, the Government has treated in ostrich-like fashion the Report of the Senate Judiciary Committee on S.919, the Senate Bill to amend and reenact EAJA, S.Rep. No. 586, 98th Cong., 2d Sess. (August 9, 1984) ("The Senate Report").

The Senate Report eradicates any lack of clarity as to Congressional intent in

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(2d Cir. 1984). Finally, these cases could have been brought as equity or mandamus actions. See Taylor v. United States, 711 F.2d 1199 (3d Cir. 1983).

the original legislative history. As this Court noted in Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980):

> While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, Teamsters v. United States, 431 U.S. 324, 354, n. 39 (1977), such views are entitled to significant weight, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), and particularly so when the precise intent of the enacting Congress is obscure.

See also Bell v. New Jersey and Pennsylvania, 103 S. Ct. 2187, 2193 (1983).

The following portions of the Senate Report are instructive:

> During the hearing process a number of legitimate issues were raised regarding the interpretation or misinterpretation of the EAJA. In addition to making

the law permanent, with an eye toward clarifications. Senators Grassley and Heflin proposed the following revisions which the Judiciary Committee then adopted.

****

Clarifying that "position of the United States includes the underlying agency conduct which led to the litigation."

Senate Report at page 5

Three years of litigation under the EAJA have resulted in conflicting determinations over the construction of the term "position of the United States" necessitating clarification.

****

[T]he approach that is the most faithful to the aims of the EAJA is one that evaluates both the agency's underlying posture that led to the litigation and the actual litigation conduct of the government. The Committee explicitly

> recognizes this in Section 2412 of the bill and thus clearly resolves any ambiguity that existed heretofore.

Senate Report at pages 7-8.

> Through this clarification the Committee specifically adopts the interpretation of the Third and Ninth Circuit Courts of Appeal [concerning] the definition of the "position of the United States." These courts have reasoned that the government position that must be evaluated includes in addition to the litigation stance, the underlying government action giving rise to the litigation.

Senate Report at page 17.

These cases present the quintessential fact situations which precipitated enactment of the EAJA. The Fourth Circuit held "that the Government was substantially justified in seeking a judicial resolution of the questions."

730 F.2d 949, 953 (4th Cir. 1984) (Pet. App. p. 5a). The Government never sought a judicial resolution. The Navy merely arrogated to itself and exercised power which it had never been given by Congress and which was in direct derogation of its own operative regulation. By the exercise of this power, the Navy required Petitioners whom the Navy was involuntarily detaining in Spain to obtain counsel thousands of miles away and to judicially challenge this clearly unlawful conduct. The Fourth Circuit noted that "[t]he Government failed, of course, to consider that it lacked the authority to hold the men. . . ." 730 F.2d at 953 (Pet. App. p. 56). A finding that a governmental department is "substantially justified" in taking an action without even considering whether it has authority

to do so, is grossly erroneous.

II. Resolution Of The Conflict Would Clearly Affect The Result In This Case

In Spencer v. NLRB, No. 83-981 (cert. denied April 16, 1984), Morris Mechanical Enterprises, Inc. v. United States, No. 83-1903 and Jarboe-Lackey Feedlots, Inc. v. United States, No. 83-1916, fees and expenses were denied in the trial courts. Indeed, in Spencer, the district court found that the Government's position was substantially justified at both the administrative and judicial stages of the controversy. 548 F.Supp. 256, 262 (D.D.C. 1982). In Morris Mechanical Enterprises, the Federal Circuit specifically addressed the pre-trial position of the parties. 728 F.2d 497, 499 (Fed. Cir. 1984). In Jarboe-Lackey, the only underlying action

was the decision to initiate the litigation. See Brief for the United States In Opposition (No. 83-1916) at page 9.

Here, when considering prelitigation events the District Court awarded fees. The Government argued to the Fourth Circuit that the District Court had committed material and reversible error because it considered the Government's underlying action. The Fourth Circuit agreed with the Government's argument that "position of the United States" was limited to the litigation position. The Government's argument now that consideration of the Government's prelitigation position would not change the result is directly inconsistent with its argument before the Fourth Circuit and plainly wrong. The Navy's basis for extending the enlistments and the Navy's

interpretation of the custody provisions of the Implementing Agreement were markedly different than the post hoc rationalizations of Justice Department attorneys during litigation.2/

III. The Pendency Of Clarifying Legislation Is No Reason To Deny Certiorari

The Government makes the anomolous argument that because there is pending legislation which would clarify the

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2/ Indeed, it is fundamental that the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination. Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 631 n.31 (1980). Agency action cannot be sustained on post hoc rationalizations supplied during judicial review. See Tabor v. Joint Board for Enrollment of Actuaries, 566 F.2d 705, 709-710 (D.C. Cir. 1977).

meaning of the phrase "position of the United States" in the manner urged by petitioners, this Court, in deference to Congress, should decline to review a decision of the Fourth Circuit which frustrates what is now clear Congressional intent. It is respectfully submitted that deference to Congress in the event of passage of this legislation would be effected by remand for reconsideration in light thereof. This course of action in light of new legal developments is well-grounded in precedent and indeed was taken by this Court when the EAJA was initially enacted. East Baton Rouge Parish School Bd. v. Knights of the Ku Klux Klan, Realm of Louisiana, 454 U.S. 1075 (1981).

IV. There Were Disputed Facts Unresolved In The Underlying Litigations

The Government argues that there were no material facts in issue. This contention is patently inaccurate; it was made in the District Court in all three cases and was uniformly rejected. In the Amidon case, the District Court recognized that there were factual disputes, but viewed disputed facts in the light most favorable to the Government. (Pet. App. p. 44a). Contemporaneous with the entry of summary judgment in favor of Amidon, the District Court entered an Order on June 22, 1981 in the Lajoie case, providing in pertinent part as follows:

> In consideration of the respondents motion for summary judgment and the petitioner's renewed motion for an evidentiary hearing, it is ORDERED that the respondents' motion is

> denied and the petitioner's motion is granted on the grounds that there are material issues of fact in dispute, and an evidentiary hearing is ORDERED to consider whether the respondents' decision to retain petitioner at the Naval Station in Rota, Sptain, was proper under Orloff v. Willoughby, 345 U.S. 83 (1952) and Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971).

Lajoie's enlistment expired, however, before the hearing, and on the basis of its decision in Amidon, the District Court entered judgment in favor of Lajoie viewing the disputed facts in the light most favorable to the Navy.

Finally, in Elwood, upon the petitioner's motion for permission to take discovery pursuant to 28 U.S.C. § 2243 and the holding of Harris v. Nelson, 394 U.S. 286 (1969), the District Court on February 12, 1982, determined that

discovery was appropriate to elicit facts necessary to help the Court "dispose of the matter as law and justice require." The initial wave of discovery only had been provided when summary judgment was entered as a matter of law upon the decision of the Fourth Circuit in Amidon. Some of the relevant facts in issue are set forth at pages 58a-72a of Petitioner's Appendix.

In connection with substantial justification analysis, the claimed position of the United States is not supported by the testimony or affidavit of any official of the Department of Defense or Department of the Navy, is contrary to the stated causes of detention in the habeas returns, and is contrary to the Navy's operative regulation and its actual interpretation of the custody obligations

in these cases. The Fourth Circuit clearly erred in engaging in fact-finding.

V. The Third Issue Presented For Review Was Clearly Raised In The Court of Appeals

The Government opposes consideration of the third issue presented by Petitioners because of "petitioners' failure to raise this point before the court of appeals" (Respondent's Brief, page 8). This contention is simply not true and the cases cited are clearly inapposite.

First and significantly it must be remembered that petitioners were appellees before the Fourth Circuit. Second, petitioners did specifically raise this issue at pages 17 through 18 of their Brief. Third, the Respondents recognized

that this issue was raised and addressed it at page 7 of their Reply Brief. Finally, when the Fourth Circuit determined ab initio that the litigation position of the United States had a reasonable basis in law, but addressed only one challenge, petitioners raised this issue with supporting precedent in two pages of their Petition for Rehearing (Petition For Rehearing, pages 11 and 12).

Although clearly raised the issue was not addressed or decided by the Fourth Circuit. This deficiency does not suggest that review by this Court would be inappropriate, but rather that disposition of the merits of the issue by this Court should await consideration of the issue by the court of appeals. Under such circumstances the appropriate response

would be to remand.

VI. Conclusion

For the reasons set forth above together with those presented in their petition, Petitioners respectfully submit that the Petition For A Writ Of Certiorari should be granted. It is particularly appropriate for this Court to address the proper interpretation of "position of the United States" where subsequent to the Senate Report clarifying Congressional intent, circuits continue to frustrate that intent by addressing only the Government's litigation position. See,

e.g., Ashburn v. United States, No. 83-7467 (11th Cir., Aug. 28, 1984).

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No. 84-114

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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and JAMES M. ELWOOD,

Petitioners

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE,
JOHN F. LEHMAN, JR., SECRETARY OF
NAVY, and ADMIRAL THOMAS M. HAYWARD,
CHIEF OF NAVAL OPERATIONS,

Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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11pp

TABLE OF AUTHORITIES

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6, petitioners submit this Supplemental Brief calling attention to the unanimous passage of House Bill 5479 reauthorizing and clarifying the

Equal Access to Justice Act, and the veto of that Bill by the President on November 9, 1984.

The first question presented for review by the Petition filed herein involves the proper construction of the phrase "position of the United States" as used in the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). On October 11, 1984, without dissenting vote, both the House and Senate passed legislation, H.R. 5479, reauthorizing and clarifying the EAJA. 130 Cong. Rec. S.14387-14388 (Daily ed. October 11, 1984). The most significant clarification in the Bill, as passed by Congress, is contained in Section 2(b)(3) wherein the following sub-section is added:

> (D) "position of the United States" includes the underlying agency action which led to the litigation;. . . .

130 Cong. Rec. S. 14387 (Daily Ed. Oct. 11, 1984).

In the Report of the House Judiciary Committee accompanying H.R. 5479, H.Rep. No. 992, 98th Cong., 2d Sess. (Sept. 6, 1984)(the "House Report"), the purpose of this clarifying amendment is explicated:

> Part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act. ...[C]ourts have construed the "position of the United States" which must be "substantially justified" in a narrow fashion which has helped the Federal Government escape liability for awards. H.R. 5479 clarifies both of these points. When the escape clause was originally written, it was understood that "position of the United States" included the underlying action--including agency action--which led to the litigation. However, courts have been divided on the meaning of "position of the United States." H.R. 5479 clarifies that the broader meaning applies."
>
> House Report at pages 6-7 (footnotes omitted)

****

> [T]hose changes which merely clarify the existing law to ensure that the Congressional intent of the original Act is implemented[32] would have the same effective date as the original Act--i.e., would apply to matters pending on or after October 1, 1981.
>
> 32 For example, clarification of the terms "position of the agency" or "position of the United States."
>
> House Report at page 15

****

The first issue presented for review involves the frustration of the Congressional intent of the original Act by the Fourth Circuit and five other circuits. The Solicitor General has urged that in addressing this issue, the Court should defer to Congress (Respondents' Brief, page 7). Petitioners concur. Congress has again clearly spoken. Absent a grant of the petition for certiorari, Congressional intent will remain frustrated.

On November 9, 1984, however, the President exercised his power to veto H.R. 5479 pursuant to Article 1, Section 7, Clause 2 of the United States Constitution. The Administration had supported the straight reauthorization of the EAJA. S. Rep. No. 586, 98th Cong., 2d Sess. pp. 21, 26 (August 9, 1984). The President's veto message makes clear that his veto was occasioned by the Congressional clarification of its original intent as to the meaning of "position of the United States."

The President clearly has the constitutional power to veto H.R. 5479 and in view of the adjournment of the Congress such action will be final as to that bill. The veto of H.R. 5479, however, has no impact on the meaning of, or Congressional intent of the original Act. The President is not at liberty to repeal Congressional enactment. Catano v. Local Bd. No. 94

Selective Service System, 298 F.Supp. 1183, 1188 (E.D. Pa. 1969). This fundamental precept is not altered by the fact that the legislation was signed into law by the previous Administration.

As this Court noted in United States v. Nixon, 418 U.S. 683, 704 (1974):

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

The Executive Branch does not dictate the meaning of duly enacted laws. Rather, it

is the province and duty of this Court "to say what the law is" with respect to the meaning of the phrase "position of the United States." E.g., United States v. Nixon, 418 U.S. at 705; Marbury v. Madison, 1 Cranch 137, 177 (1803).

By exercise of his constitutional veto power, the President has vitiated the Congressional resolution of the proper construction of the term "position of the United States." The Executive Branch, although a party to this litigation, has no veto power over a judicial resolution of the conflict. Certiorari should be granted.

By Executive fiat, this Court has been saddled with the obligation of resolving the conflict over the meaning of the term "position of the United States." The issue is relevant to hundreds of pending cases. In view of the now clear Congressional intent and this Court's pressing docket,

summary disposition might be appropriate Indeed the Solicitor General should at this stage concede error. Denial of the petition for certiorari as a result of the President's veto would erode the delicate system of checks and balances flowing from our scheme of tripartite government.

Respectfully submitted,

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11/12/84

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